

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

E.F., et al.,

Plaintiffs,

v.

**NEWPORT MESA UNIFIED SCHOOL
DISTRICT,**

Defendant.

Case No.: SACV 14-00455-CJC(RNBx)

**ORDER GRANTING IN PART
PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES**

I. INTRODUCTION

Plaintiff E.F., by and through his parents, Eric and Aneida Fulsang, and Eric and Aneida Fulsang (collectively, "Plaintiffs") brought this action against Defendant Newport-Mesa Unified School District (the "District"), appealing the judgment of an

1 administrative law judge in an administrative hearing and asserting violations of several
2 state and federal statutes. (Dkt. No. 1 [“Compl.”].) Before the Court is Plaintiff’s motion
3 for attorneys’ fees. (Dkt. 56.) For the following reasons, the Court GRANTS IN PART
4 Plaintiffs’ motion and awards **\$38,240** in attorneys’ fees.¹

5 6 **II. BACKGROUND**

7
8 E.F. is a young boy who has resided within the jurisdictional boundaries of the
9 Newport-Mesa Unified School District in California at all relevant times during this
10 litigation. (Dkt. No. 13 [“Administrative R.”] at 491.) E.F. has autism and suffers from
11 cognitive and communicative delays. Because of his autism, E.F. is eligible for special
12 education services under the Individuals with Disabilities Education Act (the “IDEA”).
13 His eligibility obligates the District to provide him with a “free appropriate public
14 education” (“FAPE”) suited to his individual needs. 20 U.S.C. § 1412(a)(1). As required
15 by the IDEA, the District convenes regular meetings to develop an annual “individualized
16 education plan” (“IEP”) identifying E.F.’s educational goals and laying out particular
17 services the District will provide to E.F. in an effort to achieve those goals. The District
18 placed E.F. in its special education program in February 2009 and has developed IEPs at
19 annual IEP conferences thereafter. (Administrative R. at 563.)

20
21 Dissatisfied with the District’s efforts to accommodate E.F.’s needs, E.F.’s parents
22 filed a request for a due process hearing before the California Office of Administrative
23 Hearings (“OAH”) on May 12, 2012. (Compl. ¶ 66.) The OAH hearing was held before
24 an administrative law judge (“ALJ”) in October 2013, where Plaintiffs contended that the
25 District failed to provide E.F. with a FAPE in a number of different ways, including by

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28 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
for October 19, 2015 at 1:30 p.m. is hereby vacated and off calendar.

1 failing to properly assess E.F.’s capabilities, insufficiently training its staff, and
2 neglecting to provide E.F. with an electronic assistive technology (“AT”) device at the
3 appropriate time. (Administrative R. at 1274.). After receiving approximately 50
4 documents into evidence and hearing testimony from 16 witnesses, the ALJ issued a
5 decision on December 26, 2013 (the “OAH Decision”). (*See id.* at 1271–1331.) The
6 ALJ rejected all of Plaintiffs’ claims except one: that the District should have given E.F.
7 an electronic assistive technology device approximately one year earlier than it did. (*Id.*
8 at 1274.) Accordingly, the ALJ awarded E.F. 20 sessions of twenty-minute, individual
9 AT services to assist him with operating the AT device—an iPod Touch—for the
10 purposes of functional communication. (*Id.* at 1331.)
11

12 In March 2014, Plaintiffs filed this action, appealing the OAH Decision to this
13 Court pursuant to 20 U.S.C. § 1415(i)(3)(A) and asserting 11 other causes of action. (*See*
14 *Compl.*) This Court affirmed the OAH Decision on June 23, and after a number of other
15 dismissals and joint stipulations, granted the District’s motion for summary judgment on
16 all of E.F.’s remaining claims on August 25. Subsequently, Plaintiffs filed this motion
17 for attorneys’ fees.
18

19 **III. ANALYSIS**

20 **1. Attorneys’ Fees under the IDEA**

21 The IDEA provides that “the court, in its discretion, may award reasonable
22 attorneys’ fees as part of the costs to a prevailing party who is the parent of a child with a
23 disability.” 20 U.S.C. § 1415(i)(3)(B)(i). Plaintiffs have the burden of demonstrating
24 that the number of hours and claimed rate are reasonable. *Jordan v. Multnomah Cty*, 815
25 F.2d 1258, 1263 (9th Cir. 1987). Here, Plaintiffs have requested \$100,560.00 in
26 attorneys’ fees (251.4 hours at a rate of \$400 per hour). The District argues that the fees
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1 should be reduced in two different ways. First, they contend that Plaintiffs are barred
2 from collecting any attorneys' fees incurred after the District made a settlement offer on
3 May 16, 2013, which—it argues—was more generous than what Plaintiffs actually
4 recovered at the OAH Hearing. Second, the District argues that Plaintiffs may only
5 recover fees commensurate with their degree of success at the OAH Hearing, and because
6 they only prevailed on one issue out of many, they should recover only a relatively small
7 proportion of their fees. The Court agrees with the District as to only the second of these
8 limitations, and limits Plaintiffs' award of attorneys' fees to **\$38,240**.

9 10 **A. Settlement Offers**

11
12 Although the IDEA generally provides for a prevailing party to collect attorneys'
13 fees, it bars all recovery of attorneys' fees by parents when the fees were "for services
14 performed subsequent to the time of a written offer of settlement." 20 U.S.C.

15 § 1415(i)(3)(D). The settlement offer² must meet three criteria to function as a bar on
16 attorneys' fees that postdate it. First, in the case of an administrative proceeding like the
17 OAH Hearing here, the offer must have been made at least 10 days before the
18 proceeding. *Id.* Second, the offer must not have been accepted within 10 days of being
19 made. *Id.* And third, the "court or administrative hearing officer [must] find[] that the
20 relief finally obtained by the parents is not more favorable to the parents than the offer of
21 settlement." *Id.* Finally, even when all of these requirements are met, an award of
22 attorneys' fees may still be made to a parent "who was substantially justified in rejecting"
23 the settlement offer. 20 U.S.C. § 1415(i)(3)(E).

24
25 The first two requirements are not at issue here. The District made an offer of
26 settlement to Plaintiffs on May 16, 2013, several months before the OAH Hearing. (Dkt.

27
28 ² Eligible offers are typically known as "ten-day offers."

65 [“Harbottle Decl.”] Exh. A.) Although the parties disagree as to whether Plaintiffs responded to the settlement offer or presented it to their clients, it is clear that the District made the offer and that Plaintiffs did not accept it.³ Plaintiffs do not allege that they made a counteroffer. The disputed issue is whether the relief awarded to E.F. and his parents at the OAH Hearing was “not more favorable” than the settlement offer made to them in May 2013.

The District’s May 16 settlement letter offered the Plaintiffs \$25,000 and a variety of “designated instructional services.” During the regular school year, E.F. would have received a one-on-one aide during the school day (up to 30 hours per week), District supervision (three hours per month), speech-language services (1.75 hours weekly), occupational therapy services (one hour per week), and assistive-technology (“AT”) services (30 minutes per month). During the extended school year, E.F. would have received a one-on-one aide for four hours a day, thirty minutes of occupational services per week, and thirty minutes of speech-language services per week. (Harbottle Decl. Exh. A.)

By contrast, the ALJ who presided over the OAH Hearing only awarded Plaintiffs 20 sessions (at 20 minutes apiece) of AT training with an iPod Touch. The District argues that this award is clearly “not more favorable” than the District’s May 2013 offer.

³ The District alleges that Plaintiffs simply ignored the May 16, 2013 offer. Counsel for the District submits a declaration averring that he “conducted a thorough search of [his] files” and that his office has “no record that Plaintiffs’ counsel responded to [the May 16, 2013] settlement offer within the requisite time frame.” (Harbottle Decl. at 2.) To support this version of events, counsel for the District attaches a portion of Plaintiffs’ counsel’s fee invoice it apparently received in 2014, purportedly to show that there are not entries demonstrating that Plaintiffs’ counsel presented the offer to her clients or discussed it with the District. (Harbottle Decl. Exh. B.) However, the fee invoice provided by the District is actually from April and May of 2012, not April and May of 2013. The fee invoice Plaintiffs’ counsel submitted to the Court with the motion for fees does have entries indicating that Plaintiffs’ counsel discussed the May 16, 2013 offer with her clients (on May 17, 2013) and then with counsel for the District (on May 23, 2013). (Dkt. 56-1 at 7.) The Court will proceed under the assumption that the parties discussed the offer but that Plaintiffs rejected it and made no counteroffer.

20 U.S.C. § 1415(i)(3)(D). It points out that the settlement offer offered significantly more hours of services and assistance than the ALJ ultimately awarded. (Dkt. 63 at 7.) Additionally, the District argues, the settlement offer included services which the Plaintiffs specifically requested at the OAH Hearing but which were not awarded, including a one-on-one aide. (*Id.* at 8.) Finally, the District notes that Plaintiffs could have purchased the 400 minutes of AT training they were awarded at the OAH Hearing from their private consultant at her hourly rate—\$155—for only \$1,038.50, a fraction of the monetary portion of the May 2013 settlement offer.⁴ (*Id.* at 7.)

Plaintiffs have two responses to this argument. First, they argue that they achieved *total* relief that outpaces the District’s settlement offer. For example, they point out that it was not until they retained counsel and filed a due process claim that the District began providing “requested assessments [and] equipment” to E.F. (Dkt. 67 at 4.) In other words, Plaintiffs believe that the “relief finally obtained by the parents” should include both what they were awarded by the ALJ and what the District elected to do independent of the OAH Hearing. This argument is unavailing. The District’s decision to provide E.F. additional services is not “relief finally obtained” by E.F.’s parents under the meaning of section 1415 because it was not awarded in a judicial or administrative proceeding. *See T.B. v. San Diego Unified Sch. Dist.*, 795 F.3d 1067, 1090 (9th Cir. July 31, 2015) (the limitation on fees asks courts to determine “whether the relief obtained *in a due process hearing* . . . is more favorable than that offered under a settlement”) (emphasis added)); *see also id.* (citing Federal Rule of Civil Procedure 68, the template for section 1415(i)(3)(D)(i)(I), which refers to “the *judgment* that the offeree finally obtains” (emphasis added)). The correct amount of relief to measure against the

⁴ The District identifies Plaintiffs’ consultant’s rate as being \$155 per hour, citing a 2014 letter which the District sent to Plaintiffs’ counsel. (*See Harbottle Decl. Exh. C.*) Although the District does not provide a record citation which the Court could use to verify this rate, Plaintiffs’ reply brief does not contest that the rate is accurate. And it goes without saying that even if the rate were actually much higher than what the District alleges, the monetary value of the proposed settlement would still far exceed the potential private cost to Plaintiffs of the AT training they were awarded at the OAH Hearing.

1 settlement offer is that awarded by the ALJ at the OAH Hearing. Here, that is 20 twenty-
2 minute AT sessions. Other services that the District chose to provide—even if its
3 decision to do so was in response to Plaintiffs’ retaining counsel and filing a due process
4 claim—are not part of the calculus in determining whether the relief Plaintiffs were
5 awarded at the OAH Hearing exceeds the relevant settlement offer. The Court agrees
6 with Defendant that the relief which Plaintiffs were awarded at the OAH Hearing was
7 “not more favorable” than that which they were offered by the District in May 2013. The
8 threshold requirements for that settlement offer to operate as a bar on subsequent fees are
9 met.

10
11 Plaintiffs’ other response to the District’s argument that its settlement offer bars
12 some of their fees is that they were substantially justified in declining the ten-day offer
13 for two reasons. The first reason is difficult to understand. Plaintiffs allege that the
14 settlement offer “did not reflect the true implementation of services (i.e., services, [sic]
15 were delivered within the classroom, regardless of designation as individual or group).”
16 (Dkt. 67 at 4.) The Court is unclear as to what this means. The settlement offer
17 specifically noted which services were to be delivered one-on-one and which were to be
18 delivered in a group environment, and Plaintiffs fail to elaborate on how the proposed
19 arrangement was deficient. This reason does not meet Plaintiffs’ burden to show that
20 they were substantially justified in rejecting the District’s settlement offer.

21
22 Plaintiffs also argue that they were substantially justified in rejecting the settlement
23 offer because it did not include attorneys’ fees. This argument has more merit. Some
24 courts have held that an IDEA plaintiff is substantially justified in rejecting a settlement
25 offer which contained a very low figure for attorney’s fees. In *Hawkins v. Berkeley*
26 *Unified School District*, for example, the school district made a settlement offer which
27 included only \$500 in attorneys’ fees, despite the fact that the plaintiffs’ attorney in that
28 case had already billed more than \$9,000 in time. No. C-07-4206, 2008 U.S. Dist.

1 LEXIS 94673, at **9–10 (N.D. Cal. Nov. 20, 2008). The court found that the plaintiffs
2 in that case were substantially justified in rejecting the offer in part because the offer
3 “would have required [their attorney] to waive her fee claim for \$500.” *Id.* See also
4 *Brighthaupt v. District of Columbia*, 36 F. Supp. 3d 1, 9 (D.D.C. 2014) (“Plaintiffs were
5 therefore substantially justified in rejecting the settlement offer based solely on the fact
6 that defendant only offered \$300 in attorney’s fees.”) Other courts have held that at least
7 in some situations, the fact that a settlement offer does not include attorneys’ fees will not
8 justify rejection by a plaintiff. See *Gary G. v. El Paso Indep. Sch. Dist.*, 632 F.3d 201,
9 210 (5th Cir. 2011) (barring post-settlement fees where the settlement did not include
10 attorneys’ fees but the plaintiff’s attorney had only billed 13.8 hours when the offer was
11 made). Here, the District made no offer of attorney’s fees at all, so Plaintiff’s counsel
12 would not have been required to waive her fee claim for a pittance.⁵ Nonetheless, the
13 District’s offer also made clear that it did not believe Plaintiffs would achieve prevailing
14 party status by accepting the offer—a tacit admission that the District intended to contest
15 a prospective fee motion based on the settlement offer.

16
17 The Court finds that Plaintiffs were substantially justified in rejecting the District’s
18 May 16, 2013 settlement offer. Plaintiffs had already incurred significant attorneys’ fees
19 by May 2013, and judging by Plaintiffs’ counsel’s fee records, she and the District spent
20 significant time in 2013 trying to hammer out a settlement. Presumably the District
21 understood that Plaintiffs—as a requirement of any viable settlement—needed to be
22 reimbursed for at least a portion of their attorneys’ fees. The fact that fees were not
23 included in the May 16, 2013 settlement offer, combined with the fact that the District
24 insisted that the settlement would not entitle Plaintiffs to a subsequent, court-imposed fee
25 award (because it would not grant Plaintiffs prevailing party status), persuades the Court
26 that Plaintiffs were substantially justified in not accepting the May 16, 2013 settlement
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28 ⁵ By the Court’s calculation, Plaintiff’s counsel had billed 46.2 hours by May 16, 2013. At her claimed \$400 rate, this amounts to \$18,480 in legal bills.

offer. As a result, Plaintiffs' fees will not be barred by their rejection of the settlement offer.

B. Degree of Success

In the Ninth Circuit, awards of attorneys' fees in IDEA actions are subject to the rule—originally announced by the Supreme Court in *Hensley v. Eckerhart*—that fee awards should be related to the success achieved by the attorneys. 461 U.S. 424, 436 (1983). As a result, a party who only partially prevails in an IDEA action “may recover attorneys' fees commensurate with the party's ‘degree of success.’” *L.H. v. Chino Valley Unified Sch. Dist.*, 944 F. Supp. 2d 867, 871 (C.D. Cal. 2013) (quoting *Aguirre v. Los Angeles Unified Sch. Dist.*, 461 F. 3d 1114, 1121 (9th Cir. 2006)). This rule is designed to “deter submission of multiple nonmeritorious claims.” *Aguirre*, 461 F.3d at 1120. The Ninth Circuit has explained:

It is understandable that without cost considerations, parents facing litigation would bring as many claims as possible, hoping to secure a larger share of the district's resources—whether in the form of reimbursements, additional staff time, or educational technology—than would be otherwise allotted to their children. Lawyers may also have incentive to bring baseless claims in order to increase billable hours devoted to a case. Acquiring a client with one strong claim should not give special education attorneys the green light to bill time on every conceivable issue. All children suffer when the schools' coffers are diminished on account of expensive, needless litigation.

Id. The Court's task here, as a result, is to determine on what proportion of their claims E.F. and his parents were successful. Doing so is difficult, and the Supreme Court has acknowledged that “[t]here is no precise rule or formula for making [the] determination”

1 of what fees are due to a party under the “degree of success” standard. *Hensley*, 461 U.S.
 2 at 436. The Court continued, “The district court may attempt to identify specific hours
 3 that should be eliminated, or it may simply reduce the award to account for the limited
 4 success. The court necessarily has discretion in making this equitable judgment.” *Id.* at
 5 436–37. Importantly, the “degree of success” standard applies even when “the plaintiff’s
 6 claims were interrelated, nonfrivolous, and raised in good faith.” *Id.* at 436. Consistent
 7 with this guidance, district courts in this Circuit routinely reduce attorneys’ fees awards
 8 under the IDEA based on the “degree of success” standard. *See J.M. v. Capistrano*
 9 *Unified Sch. Dist.*, No. SACV 10-0185, 2011 WL 1326905, at *5 (C.D. Cal. Mar. 31,
 10 2011) (reducing award by 66.67%); *S.A. v. Tulare Cty. Office of Educ.*, No. CV F 08-
 11 1215, 2009 WL 404656, at *1 (E.D. Cal. Nov. 20, 2009) (reducing award by 90%); *M.M.*
 12 *v. Lafayette Sch. Dist.*, No. CV 09-4624, 2012 WL 3257662, at *13 (N.D. Cal. Aug. 8,
 13 2012) (reducing award by 75%); *G.R. v. Brentwood Union Sch. Dist.*, No. 12-cv-06326,
 14 2013 WL 3369259, at *5 (N.D. Cal. July 5, 2013) (reducing award by 33%).

15
 16 It would be relatively straightforward to apply the “degree of success” standard
 17 here if Plaintiffs’ counsel’s billing records differentiate work done on successful claims
 18 from work done on unsuccessful claims. Unfortunately, none of counsel’s billing entries
 19 are issue-specific. For example, Plaintiff’s counsel lists 23.3 hours—among three
 20 separate days—under the description “Preparation for due process hearing (witness
 21 preparation, draft questions).” (Dkt. 56-1 at 8.) She does not make any effort to separate
 22 time spent on witnesses that testified to the AT issue on which E.F. prevailed. Other
 23 entries are similarly not detailed. Plaintiffs’ counsel bills 57.3 hours, spanning 10
 24 separate days, as “Draft closing brief.” (*Id.* at 9.) The Court has no way to determine
 25 what proportion of this drafting time was spent on successful arguments as opposed to
 26 unsuccessful ones. Plaintiffs’ counsel brought—and prevailed on—a successful claim
 27 before the ALJ. She is therefore entitled to a fee award. But it is impossible to discern
 28

1 from her billing records how much work she performed on the successful claims and
2 therefore how large a fee award she is due under the “degree of success” standard.

3
4 Faced with similar situations, some courts in this circuit have resorted to tallying
5 the number of successful claims brought by a plaintiff and comparing that number to the
6 total claims at issue in the case. *See J.M.*, 2011 WL1326905, at *4–5 (noting that the
7 plaintiffs prevailed on “two subissues” of “a total of 22—by this Court’s count—issues
8 and sub-issues”); *L.P. ex rel. Z.P.S. Lake Washington Sch. Dist.*, No. C13-1670, 2014
9 WL 2048192, at *2 (W.D. Wash. May 19, 2014) (reducing award because the plaintiff
10 prevailed on “3 out of 43 issues”). Such calculations have a number of problems and are
11 almost always unsatisfactory. Of necessity, they require assigning each legal claim or
12 “subissue” an equal weight—or coming up with a principled reason to assign different
13 issues different weights. They rely on sometimes artificial distinctions between related
14 legal claims. And they ignore significant “fixed costs” that counsel must incur to bring
15 even one successful claim. Legal claims are not like gallons of gasoline, which all cost
16 the same amount no matter how many you put in your car. Instead, estimating the cost of
17 a lawsuit is much like estimating a car’s gas mileage. Just as it takes a disproportionate
18 amount of gasoline to get a car running from a stopped position, it takes a significant
19 amount of resources to bring even one successful claim before an administrative hearing
20 like the one here. But once a lawsuit is running at “freeway speed,” the marginal costs to
21 counsel of adding additional claims are relatively low, just as maintaining a vehicle’s
22 speed uses relatively less gas.

23
24 Here, it is beyond dispute that Plaintiffs prevailed only on a narrow portion of their
25 claims. They litigated four “issues” before the administrative law judge, who noted that
26 they “partially prevailed on a small portion of Issues 1 and 2,” and that the District
27 prevailed on “all other issues heard,” including the entirety of Issues 3 and 4. (OAH
28 Decision at 61.) A tally of the relevant issues and consideration of the amount of time the

1 ALJ (and this Court, when it reviewed the appeal) devoted to successful claims as
2 opposed to unsuccessful ones indicates that Plaintiffs likely prevailed on no more than
3 one-quarter of the issues before the ALJ. Certainly Plaintiffs could not credibly assert
4 that the number is beyond one-third. This consideration, combined with *Hensley*'s
5 direction that a "district court . . . may simply reduce the award for the limited success."
6 461 U.S. at 436–37, persuades the Court to exercise its discretion and reduce Plaintiff's
7 fee award by 66.67%. The Court finds that this reduced award adequately compensates
8 Plaintiffs' counsel for the cost of bringing the successful claims but stops short of
9 draining the school district's "coffers . . . on account of needless, expensive litigation."
10 *Aguirre*, 461 F.3d at 1120.

11
12 Plaintiffs argue that this reduction is not warranted because of the "complexity of
13 the case," the "interrelatedness of the issues presented," and the "magnitude of
14 importance of the issue upon which the Plaintiffs prevailed." (Dkt. 56 at 11.) None of
15 these rationales is persuasive. First, *Hensley* makes clear that its rule applies even when
16 claims are "interrelated, nonfrivolous, and raised in good faith." 461 U.S. at 436. And it
17 would entirely undermine the purpose of the "degree of success" rule to permit counsel to
18 bring a hodgepodge of claims, drive up billable hour numbers, and then argue that the
19 hodgepodge is too complex to sort out for the purpose of calculating fees. Second,
20 Plaintiffs' argument that E.F.'s communication skills were the "linchpin" of his
21 educational success—and therefore that counsel should awarded full fees based on
22 winning the narrow assistive-technology issue—is at odds with the ALJ's decision.
23 Plaintiffs' claims against the District ran the educational gamut, arguing that the
24 District's staff was not highly qualified, that the District did not adequately train E.F.'s
25 parents, and that the District should have provided E.F. with an individual aide, to name
26 but three examples of Plaintiffs' diverse allegations. Plaintiffs do not explain how the
27 assistive technology issue was the "linchpin" for these issues or why their success on the
28 assistive technology issues merits attorneys' fees on unrelated issues on which they were

1 unsuccessful. Finally, although the Court does not wish to minimize the importance of
 2 the District providing E.F. with adequate technological communication tools, if that issue
 3 were of considerably greater magnitude than other issues before the ALJ, as Plaintiffs
 4 allege, it stands to reason that Plaintiffs would have prevailed on more issues than the
 5 narrow AT one. At the very least, if Plaintiffs had achieved success on a claim that
 6 overshadowed all the others, the ALJ would have been unlikely to write, as she did, that
 7 Plaintiffs “partially prevailed on a small portion of Issues 1 and 2” only. (OAH Decision
 8 at 61.) As a result, the Court will apply the Ninth Circuit’s “degree of success” rule from
 9 *Aguirre* and in its discretion reduce Plaintiffs’ fees by 66.67%.

10 11 **C. Fee Calculation**

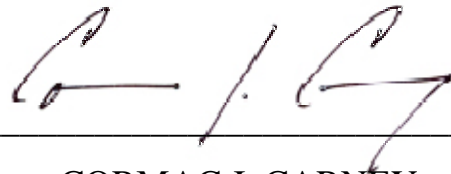
12
 13 Plaintiffs’ counsel alleges that her hourly fee is \$400 per hour. This fee appears to
 14 be appropriate given counsel’s considerable experience in litigating IDEA cases,
 15 declarations submitted by other special education attorneys, and previous fee awards.
 16 Additionally, at least one other district court in this area has found that “the prevailing
 17 hourly rate in the Los Angeles community [is] \$350 to \$525 for special education cases.”
 18 *C.B. ex. rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, No. SA CV 08-1047, 2012
 19 WL 161806, at *3 (C.D. Cal. Jan. 18, 2012). As explained above, Plaintiffs’ award will
 20 be the lodestar, subject to the “degree of success” rule. Plaintiffs’ counsel’s fee invoice
 21 indicates that she billed 233.7 hours independent of her fee motion. The Court’s review
 22 of Plaintiffs’ counsel’s billing entries indicates that—aside from the fact that they do not
 23 separate time out by issue—they appear to be generally appropriate. Multiplying 233.7
 24 hours by Plaintiffs’ counsel’s hourly rate of \$400 yields a figure of \$93,480. This figure
 25 will be reduced by 66.67% subject to the “degree of success” rule, yielding a new figure
 26 of \$31,160. To this amount the Court will add the fees Plaintiffs’ counsel incurred in
 27
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1 preparing her fee motion: 17.7 hours at the same hourly rate of \$400, yielding a figure of
 2 \$7,080.⁶ The Court therefore awards Plaintiffs **\$38,240** in attorneys' fees.

3 4 **IV. CONCLUSION**

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6 For the foregoing reasons, Plaintiffs' motion for attorneys' fees is GRANTED IN
 7 PART, and Plaintiffs are awarded **\$38,240** in attorneys' fees.

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10 DATED: October 14, 2015



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12 CORMAC J. CARNEY
13 UNITED STATES DISTRICT JUDGE
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22 ⁶ Courts typically distinguish between fees based on work on the underlying merits ("merits fees") from
 23 fees based on work on the fees motion ("fees on fees"). The District urges the Court to reduce the fees-
 24 on-fees figure by 66.67% as a result of the "degree of success" rule. There is no reason to do so.
 25 Plaintiffs would have been entitled to file their fee motion even if they had only brought—and won—the
 26 single AT claim, and therefore not been subject to the "degree of success" rule at all. The District offers
 27 no reason to believe that the hours Plaintiffs' counsel spent on her motion for fees are any higher—let
 28 alone three times as high—as they would have been had she only brought the AT claim on behalf of her
 client. And the District's citation to *Thompson v. Gomez*, 45 F.3d 1365 (9th Cir. 1995), is not to the
 contrary. There, the Ninth Circuit held that a district court's decision to reduce a fees-on-fees award
 according to the "degree of success" rule was reviewable for abuse of discretion. *Thompson* did not
 hold that district courts may never award full fees-on-fees and partial merits fees. The Court will
 therefore in its discretion award Plaintiffs the full amount of fees for time spent preparing the fee
 motion.